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MODERNRIA PLASTIC INDUSTRIES (M) SDN BHD v. TENAGA NASIONAL BHD

HIGH COURT MALAYA, PULAU PINANG
NANTHA BALAN JC
[SUIT NO: 22NCVC-120-08-2014]
27 NOVEMBER 2014

B

CIVIL PROCEDURE: *Injunction – Interlocutory injunction – Application for – Injunction to restrain disconnection of electricity supply – Discovery of meter-tampering – Meter replaced with new one – Notice of disconnection of electricity supply issued two and half months later – Whether there was time frame to disconnect electricity supply – Whether electricity could be disconnected after remedial work had been carried out – Whether offence continuous – Electricity Supply Act 1990, ss. 37(1) & 38(1)*

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UTILITIES: *Electricity – Disconnection – Discovery of meter-tampering – Meter replaced with new one – Notice of disconnection of electricity supply issued two and half months later – Whether late issuance of notice after initial discovery of meter tampering showed there was no longer urgent need to disconnect electricity supply – Whether there was time frame to disconnect electricity supply – Whether electricity could be disconnected after remedial work had been carried out – Whether offence continuous – Electricity Supply Act 1990, ss. 37(1) & 38(1)*

E

STATUTORY INTERPRETATION: *Construction – Power given by Act – Interpretation of s. 38(1) of Electricity Supply Act 1990 – Notice of disconnection of electricity supply issued two and half months after discovery of meter-tampering – Whether there was time frame to disconnect electricity supply*

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During an inspection at the plaintiff's premises, the defendant had discovered a tampering of the meter and had proceeded with remedial work by replacing the tampered meter with a new one. About two and a half months later, the defendant issued a notice of disconnection of electricity supply ('the notice') by virtue of s. 38(1) of the Electricity Supply Act 1990 ('the Act') informing the plaintiff that the latter had committed an offence under s. 37(1) of the Act and in consequence to that, the electricity supply to its premises would be disconnected. In the present application, the plaintiff sought an injunction to restrain the defendant from disconnecting the electricity supply to its premises. It was the submission of the plaintiff that the issuance of the notice about two and a half months after the initial discovery of meter tampering showed that there was no longer an urgent need to disconnect the electricity supply. In opposing the injunction, the defendant argued that: (i) s. 38(1) of the Act does not specifically set out a time frame for it to enforce its statutory right to disconnect the electricity supply; and (ii) it was entitled to issue a

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24-hours notice and proceed to disconnect the electricity supply regardless of the fact that a new meter had been installed and regardless of the fact that there was no longer any continuation of theft of electricity.

Held (allowing application):

(1) The power to disconnect the electricity supply is a power of limited duration and not a power to deprive the consumer of electricity in perpetuity. It would be a strain on the language of s. 38(1) of the Act if it were to be read as allowing future disconnection of electricity at any time as the defendant may choose in circumstances where the offence under s. 37(1) of the Act was in the past and was no longer being perpetuated. (paras 29 & 31)

(2) If the offence was continuing, then quite clearly the power under s. 38(1) of the Act could be invoked at any time, regardless of whether it was urgent or not and regardless of whether the defendant had proven in criminal proceedings that an offence had been committed. However, in the present case, the offence under s. 37(1) of the Act was a past offence and not one which was continuing. There was no suggestion of any tampering of the meter after the meter was replaced. (para 28)

(3) Since there was no longer any continuation or perpetuation of any offence under the Act which entitled the defendant to use its power under s. 38(1) of the Act to disconnect electricity to the plaintiff's premises, any such exercise of power by the defendant under s. 38(1) of the Act, in these circumstances, would be an unlawful use of statutory power. The defendant is restrained from exercising the power to disconnect under s. 38(1) of the Act until the disposal of the action so that the issue pertaining the defendant's power of disconnection could be given mature consideration. (para 33)

Case(s) referred to:

Adil Juta Sdn Bhd v. Tenaga Nasional Berhad [2014] 1 LNS 1022 HC ***(refd)***
American Cyanamid v. Ethicon Ltd [1975] AC 396 ***(refd)***
Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd [2006] 4 CLJ 892 CA ***(refd)***
Goh Guan Seng v. Tenaga Nasional Berhad [2012] 1 LNS 735 ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor & 2 Ors [1995] 1 CLJ 293 CA ***(refd)***
Tan Yeong Kim lwn. Tenaga Nasional Bhd [2000] 8 CLJ 629 HC ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:

Electricity Supply Act 1990, ss. 37(1), (3), (14), 38(1)

For the plaintiff - KC Ang; M/s CP Ang & Co
For the defendant - Rusmin Alwani Shukery (Nurmunirah Abu Bakar with her); M/s Rusmin Ida & Taryna

Reported by Najib Tamby

JUDGMENT

Nantha Balan JC:

Introduction

[1] Tenaga Nasional Bhd ("TNB") is the sole provider of electricity in Peninsular Malaysia and is a licensee under the Electricity Supply Act 1990 ("the Act") with vast powers as prescribed under the Act. The Act criminalises theft or pilferage of electricity and any form of interference with TNB's installations or meters and upon discovery of such nefarious acts or offences under the Act, TNB can disconnect the supply of electricity to the consumer's premises upon giving the requisite statutory notice. The matter that is before me is an application for an injunction to restrain TNB from disconnecting the supply of electricity to the premises of its consumer.

TNB's Power To Disconnect

[2] This case raises an issue of importance in relation to the exercise of statutory power by TNB under s. 38(1) of the Act to disconnect the supply of electricity to the premises of its consumers on account of tampering of meters or pilferage of electricity which are offences under s. 37(1), (3) and (14) of the Act.

Section 38(1) of the Act reads as follows:

> (1) Where any person employed by a licensee finds upon any premises evidence which in his opinion proves that an offence has been committed under subsection 37(1), (3) or (14), the licensee or any person duly authorized by the licensee may, upon giving not less than twenty-four hours' notice, in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.

Section 37(1), (3) and/or (14) of the Act read as follows:

> (1) Any person who tampers with or adjusts any installation or part thereof or manufactures or imports or sells any equipment so as to cause or to be likely to cause danger to human life or limb or injury to any equipment or other property shall be guilty of an offence and for each such offence shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.
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> (3) Any person who in any manner dishonestly:
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> (a) abstracts electricity;
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> (b) consumes electricity;

(c) uses electricity;

(d) alters the index of any meter or other instrument used on or in connection with any installation of any supply authority or any licensed installation for recording the output or consumption of electricity; or

(e) prevents any such meter or instrument from duly recording the output or consumption of electricity,

shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both.

...

...

...

(14) Any person who damages any meter or other instrument used on or in connection with any licensed installation, for recording the output or consumption of electricity shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years or to both.

The Issue: Whether TNB Can Lawfully Disconnect When The Offence Is No Longer Continuing

[3] The specific issue that arises in this case is whether TNB can exercise the statutory power under s. 38(1) of the Act to disconnect electricity to the premises of its consumer although the offence is no longer continuing or being perpetuated due to TNB's act of remedying the situation and replacing the tampered meter with a new meter. For convenience, the defendant shall be referred to as TNB.

The Facts

[4] The plaintiff owns a property known as No. 1109, Jalan Bagan Lallang, 13400 Butterworth, Pulau Pinang (hereinafter referred to as "the said premise"). The plaintiff runs the business of "injection moulding" at the said premises. The plaintiff is a customer of TNB. On 6 June 2014 TNB conducted an inspection at the said premises and discovered that there was tampering of the TNB meter. They issued a notice dated 6 June 2014 (exh. B encl. 10). It reads as, "Dimaklumkan bahawa pemeriksaan/pengujian kejituan telah dibuat ke atas pepasangan meter yang merekodkan penggunaan elektrik ke premis yang beralamat 1109 Jalan Bagan Lallang, 13400 Butterworth, Pulau Pinang dengan no. akaun 188537 pada 6 Jun 2014 jam 1615hrs. Hasil pengujian menunjukkan meter berkenaan tidak merekodkan bacaan penggunaan elektrik yang sebenar dan ini telah diterangkan kepada tuan/puan. Ingin dimaklumkan bahawa tuntutan amaun yang terkurang caj akan dibuat oleh TNB dan akan dimajukan kepada tuan/puan ... ."

[5] TNB also issued a notice of items seized which is also dated 6 June 2014 (see: exh. C encl. 10). The findings made by the TNB team were recorded as follows:

(i) Didapati meter utama dan meter semak bagi ketiga-tiga fasa telah "blown" (putus);

(ii) Didapati meter utama dan meter semak tiada paparan;

(iii) Terdapat kejanggalan di dalam meter bagi meter utama dan meter semak;

(iv) Didapati pada papan litar CPU Card Soket PL1 bagi meter utama telah diusik; dan

(v) Didapati soket H12 pada papan litar untuk paparan meter semak telah diusik. (see: Borang Pemeriksaan & Pengujian Pepasangan Meter dated 6.6.2014 -Alat ubah Arus Voltan Rendah - exhibit "MH-1" in the said TNB's Affidavit in Reply Enclosure 22).

[6] On the date when the inspection was carried out, TNB had in accordance with their usual practice, replaced the tampered meter with a new meter. As such, whatever offence under the Act that was committed previously came to an end with the intervening act by TNB of replacing the tampered meter with a new meter. About 2 1/2 months later, TNB issued the "Notis Pemotongan Bekalan Elektrik di bawah Seksyen 38(1) Akta Bekalan Elektrik 1990" dated 20 August 2014 ("the notice") to disconnect the electricity supply on 21 August 2014 (exh. D-encl. 10). By the notice the plaintiff was informed that an offence had been committed under s. 37(1) of the Act and that the supply of electricity would be disconnected on 21 August 2014.

[7] However, nothing untoward took place on 21 August 2014 and TNB did not disconnect the supply of electricity at the said premises. In para. 12 of TNB's affidavit in reply (encl. 22), it is stated that disconnection could not be carried out because the supply of electricity to the said premises would involve other customers of TNB in the locality and that the supply of electricity for the whole area would have to be shut down before they could disconnect supply of electricity to the said premises.

[8] The plaintiff expeditiously filed this suit on 26 August 2014 and obtained an *ex parte* injunction on 4 September 2014 restraining TNB from disconnecting the supply of electricity to the said premises. The application was then fixed for *inter partes* hearing on 12 September 2014. Since then, the injunction order has been extended on an *ad interim* basis pending disposal of the *inter partes* application for an injunction (encl. 7). The application by the plaintiff is essentially for an interlocutory application to restrain TNB from disconnecting the electricity supply to the said premises pending disposal of the action.

[9] To continue with the narrative of the events that unfolded on 6 June 2014, the TNB team had recorded all the details of the tampering on the meter and the remedial works that was done in the "borang pemeriksaan" dated 6 June 2014 and the said "borang pemeriksaan" was signed by the plaintiff's representative for the purpose of confirming that the inspection was carried out in the presence of the plaintiff's representative. The TNB staff then took the necessary remedial action in respect of the meter which had been tampered with.

[10] The remedial action taken by TNB was by way of installing a new meter. TNB claims to have taken photographs as proof of tampering on the meter. The photographs of the meter which had been tampered with which were taken by TNB on 6 June 2014 are exhibited as "MH-2" annexed to encl. 22. As a result of the tampering of the meter, TNB lodged a police report on 6 June 2014 by way of police report no: MAK MANDIN/002285/14 which has been exhibited as exh. "MH-3" in encl. 22.

The arguments

[11] In opposing the injunction, TNB maintains that it is their statutory right under s. 38(1) of the Act to disconnect electricity supply to the said premises at any time after discovery of tampering on the meter and/or meter installation at the said premises which is an offence listed under s. 37(1), (3) and/or (14) of the Act. It was submitted for TNB that based on the discovery of the offence under the Act they have every right under s. 38(1) of the Act to issue the notice before disconnecting the supply of electricity to the said premise.

[12] Counsel for TNB relied heavily on the decision of the Court of Appeal in *Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd* [2006] 4 CLJ 892, which applied the principle enunciated in *Tan Yeong Kim v. Tenaga Nasional Bhd* [2000] 8 CLJ 629, where it was observed that TNB has statutory power under s. 38(1) of the Act to disconnect the supply of electricity based on the opinion of its employee that an offence under s. 37(1), (3) and (14) of the Act has been committed.

[13] However, it is the plaintiff's contention that issuance of the notice about 2 1/2 months after the initial discovery of meter tampering shows that there was no longer an urgent need to disconnect electricity in order to prevent further theft of electricity. The plaintiff also further contended that TNB had failed to make a demand for back-charges.

[14] In response, it was submitted for TNB that s. 38(1) of the Act does not specifically set out a time frame for TNB to take action to disconnect the supply of electricity. Further counsel for TNB submitted that under s. 38(1) of the Act, TNB must establish firstly; the opinion of TNB's agent that there has been an offence committed under s. 37(1), (3) or (14) of the Act and secondly to issue a notice which should not be less than 24 hours.

[15] Counsel for TNB emphasised that s. 38(1) of the Act does not set out a time limit for TNB to enforce its statutory right to disconnect the electricity supply nor is there any requirement that TNB must demand back-charges as a pre-requisite before TNB can issue the notice to discontinue the supply of electricity. Counsel for TNB referred to the case of *Adil Juta Sdn Bhd v. Tenaga Nasional Berhad* [2014] 1 LNS 1022, where the plaintiff (consumer) in that case also raised the same issues. First it was contended for the consumer in that case that there was no reason for disconnection as there was no urgent situation which had arisen to warrant TNB to act under s. 38 of the Act and secondly the disconnection of electricity supply was unlawful and premature as the consumer was never served with any claims for outstanding amounts. The court rejected those arguments and held as follows:

> [48] It is submitted by the counsel for the plaintiff that in the present case, the defendant had failed to fulfil these two conditions. On the first condition, the plaintiff had argued that the defendant had waited for two (2) months after the meter inspection before disconnecting the supply of electricity. Thus, there was no emergence of an urgent situation to warrant the disconnection. While on the second condition, the counsel further submitted that the defendant's act in disconnecting the supply of electricity in the present case is not for the purpose of preventing abusive usage of electricity such as stealing on the basis that the defendant had waited two months before disconnecting the supply. The counsel further contended that the defendant has yet to claim against the plaintiff whatever outstanding amount if there is any in which the plaintiff claimed they had no outstanding due from the plaintiff to the defendant.

[16] The learned Judicial Commissioner in the said case also held that:

> [68] It is the court's view that both the cases had in clear language construed the operation of section 38 provision. The Federal Court in the *WRP Asia Pacific* clearly held that for the invocation of section 38 by the defendant, it merely requires a subjective finding by the defendant's employee that an offence under section 37 has been committed. The statement of law from this decision, as this court understands it is, as long as the defendant's employee found in any premises there appear any evidences an of offence committed under section 37(1), 37(3) or 37(14) and the documentation requirements envisaged in the Act has been fulfilled by the defendant, the defendant has every right to exercise the power conferred to it under section 38 to disconnect the supply of electricity. There is no issue of pre-conditions to be fulfilled by the defendant such as proof of the commission of offences or providing reasons for disconnecting the supply of electricity. Whilst the Court of Appeal in *Claybricks*'s case in its preference to accept the interpretation of section 38 in its literal and ordinary meaning by Alauddin J (as he then was), the Court of Appeal had also emphasized the correct

statement of law; that section 38 is specifically provided in the interest of the TNB to enable TNB to act quickly in preventing any abuse of electricity such as stealing.

[69] In this regard, with respect, it is this court's considered view that the plaintiff counsel's contention as well as his reading of the Court of Appeal's judgment in *Claybricks*'s case is somewhat misconceived.

[70] Firstly, accepting the plaintiff counsel arguments would be going against the authorities of two higher courts, one being the highest court in the land in which this court has no intention to depart from. Secondly, this court finds that the Court of Appeal in *Claybricks*'s case did not set out any conditions for the defendant to fulfil before invoking section 38. What the Court of Appeal actually said was this, "seksyen 38 adalah secara spesifik diperuntukan menjaga kepentingan TNB bagi membolehkan TNB bertindak cepat dan mencegah penyalahgunaan seperti kecurian". Nowhere at all was it mentioned in the judgment of the two conditions submitted by the counsel for the plaintiff.

[17] As for the approach to be taken in construing or interpreting the relevant provisions under the Act, counsel for TNB referred to the case of *Goh Guan Seng v. Tenaga Nasional Berhad* [2012] 1 LNS 735, where the court dealt with s. 38(1) of the Act in the following manner:

> In construing a statute effect must be given to the object and intent of the legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself ... Therefore, in construing any statutes, the Court will firstly, look at the words in the legislation and apply the plain and ordinary meaning of the words in the statute. If there is any ambiguity to the words used, the Court is duly bound to accept it even if it may lead to mischief. But where the language used is clear and unambiguous, it is not the function of the Court to re-write the statute in a way which it considers reasonable.

[18] Thus, counsel for TNB submitted that it is only if the words employed in the Act are not clear, that the court may adopt the purposive approach in construing the meaning of the words used. It was submitted that s. 38 of the Act is clear and is plainly a provision dealing with the disconnection of the supply of electricity and provides that TNB may, upon giving the requisite notice, disconnect electricity supply to a consumer's premises. It was contended that the exercise of power to disconnect the supply of electricity is lawful so long as it is premised upon an opinion of a TNB employee that the meter installation has been unlawfully tampered or interfered with.

[19] Counsel for TNB emphasised that the key words in s. 38(1) of the Act are 'which in his opinion' proves that an offence has been committed. The words employed in this subsection are quite clear and unambiguous.

According to counsel, the legal requirement is satisfied once a TNB employee finds evidence, which in his opinion proves that an offence has been committed under subsections of s. 37(1), (3) and (14) of the Act.

[20] Hence, counsel for TNB submitted that the opinion of a TNB employee that an offence has been committed is sufficient to justify the exercise of powers under s. 38(1) of the Act to disconnect the supply of electricity. However, counsel for the plaintiff contended that by disconnecting the supply of electricity, TNB is being oppressive and is punishing the consumer for an alleged offence which may have been committed previously.

Remedial Action By TNB

[21] It is not in dispute that on 6 June 2014 TNB had dismantled the meter which had been tampered with and replaced it with a new meter. This is clearly seen from para. 9 of the affidavit filed on behalf of TNB (encl. 22), where the deponent states that:

> Saya merujuk kepada menafikan kandungan perenggan 9 Affidavit Sokongan tersebut. Setelah pasukan pemeriksa Defendan mendapati bahawa terdapat usikan pada pepasangan meter di premis tersebut, pasukan pemeriksa telah membuat tindakan pembetulan dengan menggantikan meter baru untuk meter utama dan meter semak dan menguji semula keadaan meter-meter baru tersebut dan meter-meter tersebut disilkan. Saya memohon untuk merujuk kepada Borang Pemeriksaan tersebut yang telah diekshibitkan sebagai "MH-1" di atas.

[22] Thus, it is clear that after the inspection had been carried out by TNB on 6 June 2014 and after the remedial action had been carried out, there was no longer any defective meter or other offending device so as to facilitate the perpetuation of the offence of theft of electricity.

[23] It follows therefore that with the installation of the new meter, the consumption of electricity in the said premises was thereafter properly and accurately recorded. And so after 6 June 2014, there is in fact no question of perpetuation of an offence under s. 37(1) of the Act. Indeed, the affidavit filed by TNB (encl. 22) makes no assertion whatsoever of any continuation or perpetuation of the offence after 6 June 2014.

[24] Thus the issue that arose for consideration before me was whether s. 38(1) of the Act can be invoked after remedial work had been carried out by TNB where a new meter has been installed and the theft of electricity has been abated. In this regard, counsel for TNB said that once an offence under s. 37(1) of the Act has been established, TNB is entitled at any time thereafter to issue a 24 hours notice and proceed to disconnect the supply of electricity regardless of the fact that a new meter has been installed and regardless of the fact that there is no longer any continuation or perpetuation of theft of electricity.

[25] Thus, if counsel for TNB is right, then the consumer whose meter has been replaced, is at risk at any time after the event of discovery of the offence, of having the supply of electricity disconnected. This is a curious position for TNB to take because it means than even though they have replaced the tampered meter with a new meter and the usage of electricity consumption is being properly recorded, TNB could at any time thereafter (ie, weeks and months or years later) invoke s. 38(1) of the Act and predicate it on a previous offence which is no longer being perpetuated. This obviously raises a conundrum but in my view, the answer to the conundrum lies in the decision of the Court of Appeal in *Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd* [2006] 4 CLJ 892, where the court held that:

> [8] Kami perlu menyatakan di sini bahawa peruntukan s. 38(1) Akta tersebut adalah jelas dan terang di mana proses mahkamah tidak diperlukan untuk menentukan samada sesuatu kesalahan telah dilakukan sebelum tindakan di bawah seksyen tersebut boleh diambil. Sekiranya proses pembuktian kesalahan melalui mahkamah diperlukan ianya akan mengambil masa yang lama sebelum kuasa di bawah s. 38(1) dapat digunakan. Kami berpendapat s. 38(1) Akta tersebut telah diperuntukkan secara spesifik untuk menjaga kepentingan TNB dan membolehkan TNB bertindak cepat dan dengan itu dapat mencegah penyalahgunaan seperti pencurian bekalan elektrik yang dibekalkan oleh TNB. Jika badan perundangan berniat bahawa pembuktian kesalahan melalui mahkamah diperlukan sebelum kuasa di bawah s. 38(1) Akta tersebut dapat digunakan, maka peruntukan yang jelas harus dibuat mengenainya. Bagaimanapun tiada peruntukan seperti itu dibuat. Adalah pandangan kami tafsiran yang cuba diketengahkan oleh peguam perayu tidak dapat diterima kerana jika mahkamah ini berbuat demikian dengan memasukkan perkataannya sendiri untuk dipakai ke dalam Akta, ianya adalah bertentangan sama sekali dengan segala prinsip pentafsiran statut.

[26] To me the decision of the Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296 which had approved the principle in *Claybricks'*s case also provides the answer to point that has been raised in the present case before me. The relevant passage from the judgment of the Federal Court reads as follows:

> TNB's Section 38 notice to disconnect the electricity supply for offences in s. 37 need not prove the offences in court. The reason is that, any purported act to review such act will defeat the swift enforcement under the Act where electricity supply needs to be severed immediately to avoid further illegal usage by the perpetrator. The nature of the act taken by TNB arose from a commercial obligation on the part of the consumer rather than TNB's obligation under public law.
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> [8] Zulkefli Ahmad Makinudin JCA also elaborated that Section 38(1) of the Act was enacted to give effective powers to TNB to instantly prevent any offence that may be committed and not to be left unattended or unabated. It provided specifically for the preservation of TNB's interest and empowers TNB to act expeditiously, thereby preventing misuse such as theft of electricity supplied by TNB.

[27] And so, coming back to the issue at hand, the question now is that since the tampering had been rectified by TNB in the sense that they had installed a new meter and presumably there is no longer any tampering, whether TNB can still invoke s. 38(1) of the Act and disconnect the supply of electricity to the said premises based on the fact that some months earlier, an offence under s. 37(1) of the Act had been committed.

[28] In my view, if the offence is continuing, then quite clearly the power under s. 38(1) of the Act can be invoked at any time, regardless of whether it is urgent or not and regardless of whether TNB has proven in criminal proceedings that an offence has been committed. But the situation that presents itself in this case is different. In the present case, the offence under s. 37(1) of the Act is a past offence and not one which is continuing. Here, TNB has admitted that the meter was replaced on 6 June 2014. Also, there is no suggestion of any tampering of the meter since that date. As such, I must proceed on the basis that there has been no tampering after 6 June 2014 and the position since that date is that the amount of electricity consumed at the said premises is being correctly recorded. Hence, this brings me back to the question as to whether TNB may subsequently invoke the power to disconnect under s. 38(1) of the Act in circumstances where there is no longer any tampering or theft of electricity.

[29] In this regard it is clear from the judgment of the Court of Appeal in *Claybricks (supra)* and the judgment of the Federal Court in *WRP Asia Pacific* that the power under s. 38(1) of the Act is necessary to ensure that TNB is able to immediately severe electricity supply to avoid further illegal usage by the perpetrator. Quite clearly on the facts of the present case, there is no longer any illegal usage by the consumer such as to warrant the invoking of the power to disconnect under s. 38(1) of the Act. In this regard, it should be emphasised and borne in mind that the power to disconnect the supply of electricity is a power of limited duration and not a power to deprive the consumer of electricity in perpetuity. (See the proviso to s. 38(1) of the Act which allows disconnection for a maximum of three months).

[30] It was suggested by counsel for TNB that the point that is being ventilated in the present case had been addressed by the court in the case of *Adil Juta Sdn Bhd v. Tenaga Nasional Berhad* [2014] 1 LNS 1022. I have read the grounds of judgment in that case and paid particular regard to paras. 68, 69 and 70 of the grounds of judgment and I find that this issue was not specifically raised in that case and it does not appear that the court was asked to address its mind to this point. I therefore assume that the issue was not canvassed in that case. In any event, in that case, there were inspections on at least three occasions and on each occasion TNB discovered tampering of the meter such that the court opined that it was a case of repetitive tampering. Also in that case, electricity had in fact been disconnected. Finally, it appears in that case that tampering of the meter was still extant

as at the date when the supply of electricity was disconnected. Hence, the use of the power to disconnect under s. 38(1) of the Act may have been warranted in that case. In the present case, the facts are different.

[31] Counsel for TNB says that it is standard procedure that upon discovery of tampering of the meter/theft of electricity that TNB will immediately replace the faulty or defective (tampered) meter with a new meter. If that is the case then it means that by installing a new meter, TNB will be necessarily depriving itself of the ability to disconnect the supply of electricity as there would be no further illegal consumption of electricity. In my view, it would be a strain on the language of s. 38(1) of the Act if it were to be read as allowing future disconnection of electricity (at any time as TNB may chose) in circumstances where the offence under s. 37(1) of the Act was in the past and is no longer being perpetuated.

[32] The purpose of s. 38(1) of the Act has already been lucidly explained by the Court of Appeal and Federal Court in the *Claybricks* and *WRP Asia Pacific* cases respectively and it is clear that it is a statutory power given to TNB to swiftly disconnect after discovery of an offence, but at that point in time when the supply of electricity is being disconnected, the offence must still be continuing. I am not convinced that s. 38(1) of the Act can be utilised in circumstances where the offence is no longer continuing as there is no illegal consumption or usage of electricity which has to be severed.

[33] As such, I am of the view that on facts of this case, there is no longer any continuation or perpetuation of any offences under the Act which entitles TNB to use its power under s. 38(1) of the Act to disconnect electricity to the said premises. Hence, any such exercise of power by TNB under s. 38(1) of the Act in these circumstances, would in my view be an unlawful use of statutory power by TNB. As there is to my mind a grave doubt as to TNB's ability in law to use the power under s. 38(1) of the Act it is I think a counsel of prudence that the *status quo* be maintained such that TNB is restrained from exercising the power to disconnect under s. 38(1) of the Act until the disposal of the action so that the issue pertaining to TNB's power of disconnection can be given mature consideration at the trial.

[34] Counsel for TNB has candidly conceded that none of the previous cases involving TNB have actually directly addressed the issue as to whether the power to disconnect can be exercised where there is no longer any continuation of an offence under the Act. It is therefore urgent and imperative that the issue be ventilated promptly and settled decisively by the appellate courts so that there is certainty and clarity with regards to the utilisation of the draconian but necessary power to disconnect electricity which is being pilfered by a miscreant consumer of TNB.

[35] For now, it is my view that there is a serious question to be tried *vis-à-vis* the legal issue concerning s. 38(1) of the Act in the manner that I have discussed above and since the plaintiff is running an injection moulding

business, the economic and other losses may not be so readily calculable, to say nothing of the loss of goodwill and the irreparable harm that will befall the plaintiff if electricity is disconnected. In this regard, I have kept in the forefront of my mind the salutary advice rendered by Lord Diplock in *American Cyanamid v. Ethicon Ltd* [1975] AC 396, who said that:

> ... Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the *status quo*. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; ...

[36] In this case, TNB did not disconnect the supply of electricity despite having given the requisite statutory notice that they would do so. There is no evidence of any continuation of meter tampering or theft of electricity and as such the grant of an injunction will cause no harm to TNB whereas the refusal of an injunction may cause incalculable harm which will permanently injure the plaintiff. TNB is of course at liberty to counterclaim or file action separately against the plaintiff for any back-charges of electricity consumed but not recorded by the meter which was allegedly tampered with.

[37] For the reasons as stated above, it is my view that the balance of convenience and the balance of justice favours the grant of an injunction so that TNB is restrained from exercising any power under s. 38(1) of the Act in respect of the offences under the Act which were discovered on 6 June 2014. Ultimately, I was satisfied that there will be a greater risk of injustice if the injunction was not granted. (See: *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193 at p. 305 (CLJ); p. 206 (MLJ)).

[38] I therefore granted the injunction that was sought by the plaintiff in encl. 7 and such injunction is to continue until disposal of the suit. The matter will be fixed for case management before the Registrar on 15 January 2015. The costs of this application is fixed at RM20,000 and will be costs in the cause of the suit.

Order accordingly.